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No. 08-441

In The Supreme Court of the United States

JACK GROSS,

Petitioner,

v.

FBL FINANCIAL SERVICES, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Must a plaintiff present direct evidence of discrimination in order to obtain a *Mt. Healthy* mixed motive instruction in a non-Title VII case?

PARTIES

The parties to this proceeding are set forth in the caption.

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The May 14, 2008 opinion of the court of appeals is reported at 526 F.3d 356 (8th Cir. 2008), and is set out at pp. 1a-14a of the Petition Appendix. The June 23, 2006 order of the district court, which is not officially reported, is set out at pp. 15a-48a of the Petition Appendix. The July 8, 2008 decision of the court of appeals denying rehearing is set out at pp. 49a-50a of the Petition Appendix.

JURISDICTION

The decision of the court of appeals was entered on May 14, 2008. A timely petition for rehearing en banc was denied on July 8, 2008. The petition for writ of certiorari was filed on October 1, 2008. This Court granted certiorari on December 5, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 4 of the Age Discrimination in Employment Act, 29 U.S.C. § 623(a), provides in pertinent part:

> It shall be unlawful for an employer... to...discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age....

STATEMENT OF THE CASE

In 1971 Jack Gross was hired by a subsidiary of FBL Financial Group, which owns and manages a number of insurance and financial services companies. Gross was initially employed at what was then an Iowa subsidiary of FBL, and he continued to work in Iowa throughout his employment by FBL. In 2002 Gross held the position of Claims Administration Director,[1] overseeing many of the claims processing units at the FBL subsidiary that then included Iowa, Minnesota, South Dakota and Utah.

In 2003 the FBL subsidiary for which Gross worked merged with FBL's Kansas and Nebraska subsidiaries. At the time of this merger, Gross was demoted from Claims Administration Director to Claims Project Coordinator. (Pet. App. 22a).[2] This change in position resulted in a substantial loss in income.[3] At the time of the demotion, Gross was 54 years old. (Pet. App. 15a). Gross filed suit in federal

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[1] From 1999 to 2001 Gross was the Claims Administration Vice President. In 2001 his position was changed to Claims Administration Director. Although the responsibilities and salary of the new position were the same as Gross's old position, in certain respects it arguably was a demotion. (Pet. App. 20a-21a). FBL maintains this was little more than a change in Gross's title. (Tr. 469-70). Whatever its significance, this alteration is not at issue in the instant case.

[2] Gross remains employed in that position. (Pet. App. 23a).

[3] The jury concluded that as a result of this demotion Gross lost $20,704 in salary and $26,241 in stock options. (Pet. App. 46a).

district court under the Age Discrimination in Employment Act, alleging that he had been demoted because of his age.

At trial FBL proffered five principal explanations[4] for the demotion. (a) The responsibilities of Gross's old position as Claims Administrator Director had largely been abolished, so he had to be assigned to some other position.[5] (b) Gross was placed in the position of Claims Project Coordinator because "[his] talents were better suited to this new job."[6] (c) Gross had been assigned to this new position because there had been complaints about him by other FBL

[4] FBL's witnesses also defended the demotion on the grounds that Gross needed to foster more teamwork (tr. 433), showed too little initiative or enthusiasm (tr. 435, 480), did not like his supervisor (tr. 438), and had gossiped about the CEO (tr. 416-17). The jury, of course, could have concluded that this piling on of criticisms of Gross, rather than showing that the plaintiff was a deeply flawed worker, instead reflected a proliferation of pretextual explanations.

[5] Pet. App. 29a, tr. 445, 498-99. Some FBL officials told Gross, to the contrary, that "most of [his] job would be going to Lisa Kneeskern." (Pet. App. 23a). Two witnesses testified that the work of the newly created Claims Administration Manager, the position given to Kneeskern, was "functionally the same job" as the Claims Administrator Director position held by Gross prior to 2003. (Pet. App. 29a). The court of appeals noted that "many responsibilities associated with the Claims Administration Director position were transferred to a new position, entitled Claims Administration Manager, which was assigned to Lisa Kneeskern, an employee in her early forties." (Pet. App. 2a).

[6] Pet. App. 22a; see 23a, 28a; tr. 123.

workers.[7] (d) Gross was moved because in his earlier position he had been undermining the policies of his supervisor.[8] (e) Action was taken against Gross because he had called his supervisor a liar.[9] FBL also offered circumstantial evidence which it contended showed that the company had a general practice of treating older workers in a non-discriminatory manner.[10]

Gross adduced two types of evidence to support his claim of discrimination. First, he sought to show that the explanations offered by FBL were pretextual.[11] For example, Gross testified that in his new position he actually had nothing to do, and that that position had neither "a job description [n]or specifically assigned duties." (Pet. App. 28a). That evidence,

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[7] Pet. App. 29a, 43a; tr. 50, 439-39. One FBL manager testified that Kneeskern had complained about Gross. Kneeskern, however, denied having done so. (Pet. App. 29a-30a, 44a). At the time of his demotion, FBL officials told Gross that its actions were not based on any problems with Gross's performance as Claims Administration Director. (Pet. App. 23a).

[8] Pet. App. 43a-44a; tr. 427-28, 432-34, 718, 725.

[9] Tr. 45, 720, 735.

[10] Tr. 39, 597, 599-600, 623.

[11] In his closing statement counsel for Gross argued:

> if you find that any of the defendant's stated reasons for its decisions are not...worthy of belief, then you can find that age is a motivating factor.... [I]f you don't believe the reasons that they told you they demoted Jack Gross for, then you also don't have to believe them when they say age wasn't a factor.

(Tr. 695).

if accepted by the jury, discredited FBL's contention that Gross had been named the Claims Project Coordinator because the particular responsibilities of the new position were a good fit for Gross's abilities.[12] Gross offered testimony (including cross-examination) and documentary evidence to directly rebut each of the other explanations that FBL had given. Plaintiff's evidence disputed the truthfulness of many of the statements made by FBL's own witnesses.[13]

Second, Gross offered a variety of evidence tending to show more directly that his demotion was motivated by an intent to discriminate on the basis of age. The responsibilities of Gross's old job, rather than being abolished, were largely reassigned to a younger worker,[14] Lisa Kneeskern, in a newly titled position of Claims Administration Manager. (Pet. App. 26a). Gross introduced evidence that Kneeskern was unqualified for the position of Claims Administration Manager, or at least significantly less qualified than Gross himself.[15] Gross himself was never

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[12] The trial judge commented, "the jury could have reasonably found the stated reason for Gross' demotion was not credible because there was no defined position for Gross to 'fit' into." (Pet. App. 28a).

[13] See nn.5, 7, *supra*.

[14] At the time of these events Kneeskern was in her early forties. (Pet. App. 23a).

[15] See Pet. App. 25a-27a. FBL disputed this evidence, contending that Kneeskern was in fact well qualified for the job. The district judge observed that "the jury could have reasonably concluded that Gross was far more experienced and qualified

(Continued on following page)

given an opportunity to apply for the Claims Administration Manager job awarded to the younger Kneeskern. (Pet. App. 27a). Gross showed that several years earlier FBL had demoted another older manager to a position with no real work, an action which prompted the manager in question to retire; Gross argued that this was the same discriminatory tactic used against him. (App. 20a-21a). Gross put in evidence a document which showed that at the time of his demotion in 2003 a disproportionate number of the demoted workers were over 50, while most of the workers receiving promotions were younger.[16]

At the close of the trial the judge, over FBL's objection, gave the jury the following instruction:

> Your verdict must be for plaintiff if all the following elements have been proved by the preponderance of the evidence:

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than Kneeskern for the claims administration manager position." (Pet. App. 27a).

[16] P. Ex. 15; tr. 701-02; see Pet. App. 25a. Gross also offered testimony indicating that there had been other incidents of age discrimination at the time of his demotion. (Pet. App. 30a-31a).

FBL argued that the demotions of other older workers were the result of their "specific circumstances," not age discrimination. (Pet. App. 31a). The trial judge concluded that whether those other demotions were the result of age discrimination was "for the jury" (Pet. App. 31a), and that "[a]n inference of age discrimination was...raised by evidence regarding the demotions of other employees in connection with the 2003 merger." (Pet. App. 30a).

> *First*, defendant demoted plaintiff to claims project coordinator effective January 1, 2003; and
>
> *Second*, the plaintiff's age was a motivating factor in defendant's decision to demote plaintiff.
>
> However, your verdict must be for defendant if any of the above elements has not been proved by the preponderance of the evidence, or if it has been proved by the preponderance of the evidence that defendant would have demoted plaintiff regardless of his age. You may find age was a motivating factor if you find defendant's stated reasons for its decision are not the real reasons, but are a pretext to hide age discrimination.

(Jury Instruction No. 11, J. App. 9-10) (emphasis in original).[17] The court below referred to this as a "mixed motive instruction." (Pet. App. 7a, 12a). The judge also instructed the jury that

> [a]s used in these instructions plaintiff's age was "a motivating factor," if plaintiff's age played a part or a role in the defendant's decision to demote plaintiff. However, plaintiff's age need not have been the only reason for defendant's decision to demote the plaintiff.

(Jury Instruction No. 12, J. App. 10).

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[17] This instruction is similar to the instruction upheld by this Court in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 96-97 (2003).

The trial judge rejected a proposed defense instruction that would have required the plaintiff to prove that his

> age was the *determining* factor in Defendant's decision.... "Age was a determining factor" only if Defendant would not have made the employment decision concerning Plaintiff but for his age; it does not require that age was the only reason for the decision made by the Defendant.

(J. App. 9) (emphasis added).[18] Under both the actual instruction and the rejected instruction, if the jury found that age was a motivating factor, the outcome of Gross's claim would depend on whether FBL would have made the same decision in the absence of discrimination.[19] The critical difference between the instructions concerned which party bore the burden of proof regarding what FBL would have done in the absence of discrimination.

In their closing statements counsel for plaintiff and defendant both advanced arguments as to whether the evidence showed that age was a motivating factor. (Tr. 687-746). Counsel for FBL, however, did not seek to advance the "same decision" defense set out in the jury instructions. FBL opted only to argue that there never had been any age discrimination at all, and did not ask the jury to find that the

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[18] See tr. 667, 670, 675-76.

[19] See n.21, *infra*.

company would have made the same decision even in the absence of any discrimination. (Tr. 711-36).

The jury returned a verdict for the plaintiff. (J. App. 8). In light of the instructions, that verdict necessarily meant that the jury concluded that age was a motivating factor, but did not find that FBL would have made the same decision in the absence of discrimination. FBL moved for judgment as a matter of law, arguing that there was insufficient evidence to support a jury finding that age was a motivating factor, and also sought a new trial on that issue. The trial judge denied that motion, noting that "there was ample evidence to justify the conclusion that FBL intentionally discriminated against Gross based on his age." (Pet. App. 45a). FBL's post-trial motion did not challenge the jury's finding that the defendant had failed to demonstrate that it would have made the same decision in the absence of discrimination.[20]

The Eighth Circuit overturned the jury verdict, concluding that it was error to give the disputed jury instruction. The court of appeals held that which party bears the burden of proof regarding how the defendant would have acted in the absence of discrimination depends on what type of evidence the plaintiff uses to establish that age was a motivating factor. If the plaintiff shows by direct evidence that

[20] Defendant's Brief in Support of Renewed Motion for Judgment As a Matter of Law, or in The Alternative Motion for a New Trial.

age was a motivating factor, the defendant bears the burden of proof. Where, on the other hand, the plaintiff's showing of an unlawful discriminatory purpose does not rest on direct evidence, the burden of proof is on the plaintiff.

During the post-trial motions, counsel for plaintiff had summarized the evidence as follows:

> [W]e don't have anything in this case that says we've got to get rid of Gross because of his age or we've got to demote Gross because of his age or Jack [Gross] is old and over the hill and give that position to [the younger worker], it isn't there.
>
> But *if that's what direct evidence is*, then we don't need it, and there's plenty of this record that's circumstantial to support the conclusion and the inference that age was a basis, age was a motivating factor....

(Appellant's App. 596) (emphasis added). The court of appeals cited this acknowledgement – that there were not overt statements of age bias in connection with the demotion decision – as showing that the Eighth Circuit's direct evidence standard was not satisfied. "Gross conceded that he did not present 'direct evidence' of discrimination, (Appellant's App. 596), so a mixed motive instruction was not warranted." (App. 7a). Because the plaintiff lacked the requisite "direct evidence," the Eighth Circuit held, the burden of proof should have been placed on Gross rather than on FBL. (Pet. App. 3a-12a).

The court of appeals did not address FBL's argument that there was insufficient evidence to permit a reasonable jury to conclude that age was a motivating factor. (Pet. App. 14a).

The court of appeals denied a timely petition for rehearing. (Pet. App. 49a-50a). This Court granted certiorari. 129 S.Ct. 680.

SUMMARY OF ARGUMENT

This Court has not "restricted a litigant to the presentation of direct evidence absent some affirmative directive in a statute." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003). It should not do so here.

In both *Desert Palace* and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), this Court indicated that in discrimination cases it would not depart from the conventional rules of civil litigation where the relevant statutory language did not authorize such a departure. *Price Waterhouse* noted that proof by a preponderance of the evidence – rather than by clear and convincing evidence – is the normal rule in civil litigation. Because the statute in that case did not require clear and convincing evidence, the Court declined to impose such an elevated evidentiary requirement. *Desert Palace* recognized that the conventional rules of proof permit circumstantial as well as direct evidence to establish a disputed fact. Because the statute in *Desert Palace* was "silen[t] with

respect to the type of evidence required," 539 U.S. at 99, the Court declined to insist on proof by direct evidence.

Congress enacts legislation against the well-established principles of proof in civil cases, and can be presumed to contemplate application of those principles in litigation to enforce federal laws. When Congress has wanted to depart from those established principles, it has done so expressly, by enacting specific language substituting some other standard. There are, for example, ninety-four federal laws that require, instead of proof by a preponderance of the evidence, proof by "clear and convincing evidence." In the absence of such express provisions, it is reasonable to conclude that Congress intended that the conventional standards would apply.

Adhering to the conventional rules, except where Congress specifically directs otherwise, would promote stability and clarity in the law. If the federal courts were to undertake on their own to substitute non-conventional rules, there would be no manageable judicial standard to delineate when non-conventional rules should be adopted by the courts, or what types of non-conventional rules the courts should devise.

In the wake of *Price Waterhouse*, for example, many lower courts attempted to fashion some sort of "direct evidence" standard to use in deciding whether to give a *Mt. Healthy* mixed motive instruction. Justice Kennedy correctly foresaw that those efforts

would lead to judicial confusion. 490 U.S. at 291 (dissenting opinion). Within a few years after *Price Waterhouse* "the various circuits ha[d] about as many definitions for 'direct evidence' as they d[id] employment discrimination cases." *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir. 1992). The Eighth Circuit itself has utilized three different definitions of "direct evidence." Further difficulties of this sort would be avoided by a decision requiring adherence to the conventional rules of civil litigation except where Congress has specifically directed use of some different standard.

The terms of the Age Discrimination in Employment Act – or, more precisely, the lack of any such directive in the ADEA – is dispositive. The ADEA does not require a plaintiff (or defendant) to establish anything by direct evidence, does not bar reliance on circumstantial evidence, and does not insist on proof by clear and convincing evidence. The Court should not engraft onto the ADEA a departure from the conventional standards of litigation which Congress knew how to – and indisputably did not – include in the language of the statute.

The court below erred in holding that Justice O'Connor's concurring opinion in *Price Waterhouse* – which favored a direct evidence requirement – was the "controlling opinion that sets forth the governing rule of law." (Pet. App. 5a). Neither the plurality opinion in *Price Waterhouse*, joined by four members of the Court, nor the concurring opinion of Justice White, contain any such requirement of direct

evidence. There were thus five votes in *Price Waterhouse* for the rule under which, regardless of whether there is direct evidence, when a plaintiff proves that an impermissible purpose was "a motivating factor," the defendant bears the burden of showing that it would have made the same decision in the absence of discrimination.

ARGUMENT

In a disparate treatment case under the ADEA the plaintiff must establish that age was a motivating factor in the employment decision at issue.[21] If a plaintiff meets that burden, whether the plaintiff is entitled to monetary or corrective injunctive relief (such as reinstatement or promotion)[22] turns on whether the employer would have made the same

[21] In the courts below FBL contended that there was insufficient evidence to support the jury's finding that age was a motivating factor. The court of appeals did not reach that issue, and it remains open for resolution on remand.

[22] A plaintiff may have standing to seek prospective injunctive relief against future discrimination regardless of whether at some point in the past he or she was injured by that discrimination. *Northeastern Florida Chapter of Associated General Contractors of Florida v. City of Jacksonville*, 508 U.S. 656 (1993). In the instant case the plaintiff sought only monetary relief for economic injury caused by the asserted discrimination and corrective injunctive relief. This case therefore does not require the Court to decide whether, in addition to prospective injunctive relief, there are other remedies that might be appropriate despite a showing by an employer that it would have taken the same past decision in the absence of discrimination.

decision in the absence of that discriminatory purpose. All the lower courts agree, as did the court below, that (in at least some circumstances) the burden of proof regarding what would have occurred in the absence of discrimination may be imposed on the defendant.[23] That allocation of the burden of proof derives from this Court's decision in *Mt. Healthy City School District Bd. of Education v. Doyle*, 429 U.S. 274, 287 (1977). The Eighth Circuit erred in holding that a *Mt. Healthy* mixed motive instruction[24] can be given only when the plaintiff has met a special

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[23] Although, the employer bears that burden of proof regarding this issue, a plaintiff might voluntarily assume that burden. Thus, although an ADEA plaintiff would be entitled to the instruction given in this case, the plaintiff could opt for a less favorable (but simpler) instruction, under which the plaintiff would be required to show that any proven discriminatory factor made a difference to the outcome. See *Price Waterhouse*, 490 U.S. at 246 n.11 (plurality opinion), 276 (O'Connor, J., concurring), 282 (Kennedy, J., dissenting).

[24] The lower courts occasionally refer to the sort of instruction given in this case as a "mixed motive instruction." That phrase is somewhat confusing, because *any* instruction dealing with who bears the burden of proof regarding what an employer would have done in the absence of discrimination would be an instruction about mixed motives. In the instant case, respondent's proposed instruction (J. App. 9), like the instruction given by the trial court, dealt with mixed motives, but would have placed the burden of proof on the plaintiff rather than the defendant.

We refer to a mixed motive instruction placing the burden of proof on the defendant as a *Mt. Healthy* mixed motive instruction, in order to distinguish it from the type of mixed motive instruction proposed by respondent.

elevated standard of proof, demonstrating by direct evidence the existence of a discriminatory motive.

I. THE ADEA SHOULD NOT BE CONSTRUED TO IMPOSE ANY ELEVATED EVIDENTIARY STANDARD IN THE ABSENCE OF AN EXPRESS STATUTORY DIRECTION

This Court has repeatedly refused to impose special standards of proof on civil litigants. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court held that a Title VII defendant which seeks to show that it would have made a disputed decision in the absence of discrimination need not prove that fact by clear and convincing evidence. 490 U.S. at 252-53 (plurality opinion), 260 (White, J., concurring), 260 (O'Connor, J., concurring). *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), held that a Title VII plaintiff is not required to prove by direct evidence that a discriminatory purpose was a motivating factor behind a disputed employment action.[25] In *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 615-17 (1993), the Court concluded that direct evidence of discrimination is not required to support a finding that a violation of the ADEA was willful. See 29 U.S.C. § 626(b).

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[25] The decision in *Desert Palace* rested in part on the language of the 1991 Civil Rights Act. 539 U.S. at 98-99. But, as we explain below, much of the reasoning in *Desert Palace* applied more broadly.

Those decisions establish that, where the text of the relevant statute does not specifically impose any elevated evidentiary requirement on a party in civil litigation, the courts themselves will not do so. The absence of any direct evidence requirement in the text of the ADEA is thus dispositive in the instant case.

The linchpin of this aspect of the decisions in both *Price Waterhouse* and *Desert Palace* was that "[c]onventional rules of civil litigation generally apply in Title VII cases." *Price Waterhouse*, 490 U.S. at 253; *Desert Palace*, 539 U.S. at 99. Where there is no contrary statutory direction, those conventional rules ordinarily govern the quantum of proof which a party must adduce in civil litigation.

> Exceptions to this [preponderance of the evidence] standard are uncommon, and in fact are ordinarily recognized only when the government seeks to take unusual coercive action – action more dramatic than entering an award of money damages or other conventional relief – against an individual.

Price Waterhouse, 490 U.S. at 252 (plurality opinion).

The conventional rule applied in *Price Waterhouse* was that "parties to civil litigation need only prove their case by a preponderance of the evidence." 490 U.S. at 253. The rule invoked by the Court in *Desert Palace* was that a plaintiff is not required to adduce direct evidence.

> [A] plaintiff [may] prove his case "by a preponderance of the evidence," [*Price Waterhouse*, 490 U.S. at 253], using "direct or circumstantial evidence." *Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983).

539 U.S. at 99.

> We have often acknowledged the utility of circumstantial evidence in discrimination cases. For instance, in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), we recognized that evidence that a defendant's explanation for an employment practice is "unworthy of credence" is "one form of *circumstantial evidence* that is probative of intentional discrimination." *Id*. at 147 (emphasis added).

539 U.S. at 100. The claim in *Reeves*, as in the instant case, arose under the ADEA.

> The reason for treating circumstantial and direct evidence alike is both clear and deep rooted. "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508 n.17 (1957).
>
> The adequacy of circumstantial evidence also extends beyond civil cases; we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction,

> even though proof beyond a reasonable doubt is required....

539 U.S. at 100.[26]

For many years the idea that direct evidence must be adduced to prove a disputed fact has been anathema to the law. Over a century ago this Court rejected a suggestion that such a fact could only be demonstrated by direct evidence.

> [W]e are not aware of any rule of law which requires any particular method of proving such a fact, differing from that required to prove any similar fact. Whatever naturally and logically tends to establish it is competent evidence.

Standard Oil Co. v. Van Etten, 107 U.S. 325, 332 (1882). Countless federal and state juries have been instructed, as was the jury in the instant case, to draw no distinction between direct and circumstantial evidence. See *Desert Palace*, 539 U.S. at 100. The Eighth Circuit itself has repeatedly recognized that in criminal cases "circumstantial evidence is as intrinsically probative as direct evidence," *U.S. v. Bradley*,

[26] The Eighth Circuit acknowledged that "some of the analysis in *Desert Palace* may seem inconsistent with" the direct evidence requirement in Justice O'Connor's opinion in *Price Waterhouse*. (Pet. App. 11a).

473 F.3d 866, 867 (8th Cir. 2007),[27] and "may be the sole support for a conviction." *U.S. v. Posters N Things, Ltd.*, 969 F.2d 652, 662 (8th Cir. 1992).

This Court has repeatedly emphasized that direct (as opposed to circumstantial) evidence is *not* required to prove the existence of a discriminatory or otherwise improper motive. *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3, 717 (1983); *Rogers v. Lodge*, 458 U.S. 613, 618 (1982). That longstanding rule applies whenever a plaintiff seeks to show the existence of an impermissible motivating factor, regardless of whether that showing once made is relied on to establish the existence of an unlawful purpose, or to place on the defendant the burden of demonstrating that it would have taken the same action even in the absence of discrimination.

Congress legislates against this background of established rules of civil litigation. When Congress wishes to impose a higher standard of proof, it is free to do so; absent such legislative direction, however, Congress can be presumed to have intended the conventional rules will apply. Thus in *Desert Palace*

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[27] See *U.S. v. Maxwell*, 498 F.3d 799, 801 (8th Cir. 2007); *U.S. v. Opare-Addo*, 486 F.3d 414, 416 (8th Cir. 2007); *United States v. Jackson*, 365 F.3d 649, 655 (8th Cir. 2004); *U.S. v. Gipp*, 147 F.3d 680, 689 (8th Cir. 1998); *U.S. v. Wilcox*, 50 F.3d 600, 602-03 (8th Cir. 1995); *U.S. v. Jones*, 16 F.3d 275, 279 (8th Cir. 1994).

the Court reasoned that if Congress had wanted to impose a direct evidence requirement on plaintiffs, it

> could have made that intent clear by including language to that effect in [Title VII]. Its failure to do so is significant, for Congress has been unequivocal when imposing heightened proof requirements in other circumstances.... See, *e.g.*, 8 U.S.C. § 1158(a)(2)(B) (stating that an asylum application may not be filed unless an alien "demonstrates by clear and convincing evidence" that the application was filed within one year of the alien's arrival in the United States); 42 U.S.C. §5851(b)(3)(D) (providing that "[r]elief may not be ordered" against an employer in retaliation cases involving whistleblowers under the Atomic Energy Act where the employer is able to "*demonstrat[e] by clear and convincing evidence* that it would have taken the same unfavorable personnel action in the absence of such behavior" (emphasis added)); cf. *Price Waterhouse*, 490 U.S. at 253 (plurality opinion) ("Only rarely have we required clear and convincing proof where the action defended against seeks only conventional relief").

Desert Palace, 539 U.S. at 99 (emphasis in original).

> Title VII's silence with respect to the type of evidence required in mixed-motive cases... suggests that we should not depart from the "[c]onventional rul[e] of civil litigation [that] generally applies in Title VII cases." [*Price*

> *Waterhouse*, 490 U.S. at 253 (plurality opinion)].

539 U.S. at 99.

Some Eighth Circuit decisions require as a precondition of a *Mt. Healthy* mixed motive instruction (and define as direct evidence) proof which is "strong" or "clear." See pp. 36-37, *infra*. But Congress has adopted ninety-four statutes requiring, in other contexts, that a particular showing be made by "clear and convincing evidence." Other such statutes require that evidence be "clear," "unmistakable," "unequivocal," "compelling," or "conclusiv[e]."[28] The failure of Congress to include any such language in the ADEA was assuredly deliberate.

Other Eighth Circuit decisions demand (and define as direct evidence) proof of a very specific (and uncommon) type of discriminatory remark. See pp. 37-42, *infra*. Congress has been extremely reluctant to incorporate that sort of specialized evidence requirement into federal law, presumably recognizing that limiting a litigant in that way would often impose an impossible burden. There appear to be only a handful of federal laws with this sort of requirement, all of which insist upon certain types of written evidence.[29] For example, 3 U.S.C. § 20 provides that

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[28] A list of those statutes is set out in an appendix to this brief.

[29] See 7 U.S.C. § 2009h ("evidence [of community support for a project] shall be in the form of a certification of support for

(Continued on following page)

> [t]he only evidence of a refusal to accept, or of a resignation of the office of President or Vice President, shall be an instrument in writing, declaring the same, and subscribed by the person refusing to accept or resigning, as the case may be, and delivered into the office of the Secretary of State.

Where Congress has concluded that such special evidence requirements should be limited to a literal handful of rarely applied statutes, it would be manifestly inappropriate for the courts to import just such requirements into other laws and then apply them – as has the Eighth Circuit – in a large number of cases.

Yet a third line of Eighth Circuit cases requires (and defines as direct evidence) non-circumstantial evidence. (See pp. 34-36, *supra*). No provision in the United States Code requires a party – even the United States in a capital case – to prove any fact by that sort of direct evidence; every reference to circumstantial evidence in the United States Code

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the project from each affected general purpose local government"), 12 U.S.C. § 2503 (where records do not reveal where money order or traveler's check was purchased, bank which issued it may escheat the funds under the laws of the state in which the bank has its principal place of business "until another State shall demonstrate by written evidence that it is the State of purchase"), 31 U.S.C. § 1501(a) ("[a]n amount shall be recorded as an obligation of the United States Government only when supported by [certain specified] documentary evidence").

expressly permits its use.[30] It would be unwise for the courts to engraft onto any federal statute an evidentiary requirement that Congress itself has never thought appropriate in any context.

The pattern of federal legislation in this area makes clear the willingness of Congress to expressly so provide when it wishes to require certain types of evidence, or to establish some elevated standard of proof. As this Court noted in *Desert Palace*,

> [i]t is not surprising, therefore, that neither petitioner nor its *amici curiae* can point to any other circumstance in which we have restricted a litigant to the presentation of direct evidence absent some affirmative directive in a statute.

539 U.S. at 100. In this context, the terms of the ADEA – or, more precisely, the lack of any such "affirmative directive in [the] statute" – is dispositive. The ADEA does not require a plaintiff (or the defendant) to establish anything by direct evidence, does not bar even exclusive reliance on non-direct evidence, and does not insist on proof by clear and convincing evidence.

In *Hazen Paper Co. v. Biggins* this Court rejected an Eighth Circuit requirement that a plaintiff adduce direct evidence in order to establish that a violation of

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[30] 5 U.S.C. § 1221(e)(1); 21 U.S.C. § 863(e)(6); 22 U.S.C. § 1319(c)(3)(B)(II); 42 U.S.C. §§ 6928(f)(2)(B), 7413(c)(5)(B).

the ADEA was willful. 507 U.S. at 616 (citing *Neufeld v. Searle Laboratories*, 884 F.2d 335, 340 (8th Cir. 1989)). Under the ADEA plaintiffs are entitled to liquidated damages for willful violations, which this Court had earlier held requires a showing that an employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Trans World Airlines v. Thurston*, 469 U.S. 111, 126 (1985). The Eighth Circuit in *Neufeld* had concluded that an additional direct evidence requirement was desirable to limit the number of ADEA cases which would otherwise be willful. 884 F.2d at 340. This Court refused to engraft such a requirement into the statute. "Once a 'willful' violation has been shown, the employee need not additionally...provide direct evidence of the employer's motivation." 507 U.S. at 617.

Colorable policy arguments could perhaps be fashioned for departing in this case from the conventional rules of litigation, and imposing on plaintiffs some elevated standard of proof when they seek a *Mt. Healthy* mixed motive instruction. The court of appeals may have believed that it would be best to limit the number of cases in which such an instruction can be given, and might have concluded that adopting a special standard of proof would be an effective way to impose such a limitation. But that simply was not the choice that Congress made when it wrote the statute.

II. THE IMPOSITION OF ELEVATED EVIDENTIARY REQUIREMENTS SHOULD BE MADE BY CONGRESS

The conventional rules of civil litigation derive from a substantial body of judicial experience over a long period of time and a wide range of civil claims. Those rules represent an intensely practical set of conclusions regarding the standards that most effectively further the search for truth and assure fairness to the parties. A particular virtue of these rules is that they are the same for all claims and all claimants; we do not, for example, have different hearsay rules for contract, tort, and claims in equity. Such circumstance-specific variations would force the courts to revisit endlessly the otherwise established and predictable standards.

Congress, of course, can and does depart from those standards in framing particular statutes. It may choose to do so out of solicitude for certain potential plaintiffs or defendants, a desire to facilitate enforcement of laws of especial importance, or a concern to temper application of statutes of particular burdensomeness. Where Congress decides to fashion some statute-specific evidentiary standard, it can frame any number of distinctive statutory measures. But the fashioning of such alternatives, like the decision to depart at all from the conventional rules of litigation, turns on the types of policy choices that fall within the unique province of the legislative branch.

A. Congress Should Determine When The Conventional Standards of Proof Should Be Modified

If the courts are to undertake to decide on their own when to put aside the conventional standards of civil litigation, they will need a clear and predictable rule as to when they should do so. Were the Court, for example, to require plaintiffs in the instant type of situation to adduce direct evidence, it would be necessary to establish some guideline for the lower courts to use in the future to select, from among the vast array of statutes and issues that come before them, those which should and should not continue to be governed by the usual standards.

If in the instant case direct evidence (however defined) is required to obtain a *Mt. Healthy* instruction under the ADEA, the lower courts would have to decide in the years ahead whether to apply that (or some other) non-traditional standard to each of the other federal laws (including, but certainly not limited to, anti-discrimination laws) in which liability is imposed for actions taken for a particular impermissible purpose. Under any of those laws, where the plaintiff establishes the existence of an impermissible motivating factor, a defendant could insist that the plaintiff adduce direct evidence (or some other special type of proof) in order to obtain a *Mt. Healthy* instruction.

Not even the Eighth Circuit suggests that a direct evidence requirement should be used in all of these cases. To the contrary, the Eighth Circuit itself

does not impose a direct evidence requirement in First Amendment cases,[31] and does not require direct evidence in National Labor Relations Act cases. *Concepts & Designs, Inc. v. NLRB*, 101 F.3d 1243, 1244-45 (8th Cir. 1996); see *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401-03 (1983).[32] But nothing in the text of the NLRA, Title VII, the ADEA, or any of the other statutes under which this issue could arise provides any basis for deciding – if the

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[31] *Davison v. City of Minneapolis, Minnesota*, 490 F.3d 648, 655 n.5 (8th Cir. 2007).

[32] Motivation is a question of fact that may be inferred from both direct and circumstantial evidence.... Once the general counsel has established that the employees' union activity was a motivating factor in the discharge, the burden shifts to the employer to demonstrate that he would have taken the same action even in the absence of protected activities.

101 F.3d at 1244-45 (8th Cir. 1996). In *NLRB v. DBM, Inc.*, 987 F.2d 540, 543 (8th Cir. 1993), the Eighth Circuit applied the rule in *Transportation Management* to a case in which the finding of an impermissible motivating factor was based on a determination that the employer's proffered explanations "smack of pretext." In applying that principle in *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1510 (8th Cir. 1993), the Eighth Circuit held that in deciding whether there was an impermissible motivating purpose, "the Board is free to draw reasonable inferences from both direct and circumstantial evidence, because the employer's intent will rarely be proven by direct evidence alone." 989 F.2d at 1508.

See *St. Lukes Episcopal-Presbyterian Hospitals, Inc. v. NLRB*, 268 F.3d 575, 581 (8th Cir. 2001); *NLRB v. MDI Commercial Services*, 175 F.3d 621, 625 and n.2 (8th Cir. 1999) ("proof that the employer would have taken the same action in any event is an affirmative defense").

courts undertake to decide – when a direct evidence rule should and should not be applied.

If the courts are now to pick and choose when to depart from conventional standards of proof, there is no obvious reason why that should be limited to disputes involving multiple motives. There is nothing so unique about the situation in this case that would readily distinguish it from every other statute and issue in which a party might ask for a departure from the conventional rules of litigation.

Defendants understandably would prefer never to bear the burden of proof regarding what would have occurred in the absence of discrimination, but if the inconvenience of meeting that burden is sufficient to warrant departing from the usual standards of proof, there are assuredly claims and remedies which impose significantly greater burdens on defendants, and which might give rise to yet more requests for imposing elevated burdens on plaintiffs. Defendants could argue that particular types of claims (ADEA disparate impact claims, perhaps) or certain forms of relief (e.g. punitive or liquidated damages) must be supported by direct evidence, or eyewitnesses, or documentary proof. Plaintiffs, on the other hand, could argue (like the plaintiff in *Price Waterhouse*) that where federal law recognizes an affirmative defense – thus denying relief that would otherwise be required – defendants should be required to establish those defenses by clear and convincing evidence. Under the ADEA, for example, an employer which has used age as a criterion for an employment

decision can avoid liability if age is a BFOQ, 29 U.S.C. § 623(f)(1), or if reliance on that criterion was mandated by the laws of the country in which the workplace was located. *Ibid*.

Unless the Court continues to insist, as it did in *Desert Palace*, that requests for a departure from the conventional evidentiary standards be addressed to Congress, any litigant might reasonably contend that its opponent should be subject to some special more stringent standard. Absent any obvious and clear limiting principle, those demands could rapidly undermine the stability of the law that has until now served the courts, and litigants, so well.

B. Congress Should Determine What Evidentiary Standard Should Be Substituted for the Conventional Standards

In addition to having to decide *when* to depart from the usual evidentiary standards, the courts which opted to do so would in each instance have to decide *what* the alternative standard would be, framing some new rule of their own. The courts might choose among any of the various special statutory standards, selecting for example a requirement that proof be clear, clear and convincing, unmistakable, or unequivocal. But there is no reason why a judicially created standard would have to be chosen from among such existing provisions; the courts could fashion any number of entirely novel evidentiary requirements.

The history of the direct evidence requirement clearly illustrates the problems that arise when judicial creativity is unleashed in this manner. In the wake of *Price Waterhouse*, some lower courts mistakenly concluded that Justice O'Connor's concurring opinion was the controlling opinion, and therefore attempted to devise some ad hoc definition of "direct evidence." "Direct evidence" became a phrase in search of a meaning, and the search did not go well. That nearly twenty-year effort was untethered to the language or legislative history of the anti-discrimination laws at issue and unguided by any meaningful precedent or legal history. The results have been conflicting, inconsistent, and often essentially unexplained.

The effort to fashion a plausible definition of "direct evidence" foundered in part because there is no established body of caselaw on which the lower courts could rely. Before *Price Waterhouse* the definition of "direct evidence" was unimportant because the law attached no significance whatever to whether evidence is or is not "direct." Whether or not the testimony of a witness constitutes direct evidence is as irrelevant as whether the witness testified before or after lunch. Juries have widely been instructed that they are to attach no significance to whether evidence is "direct." *Desert Palace*, 539 U.S. at 100. In the instant case the trial judge, without objection,

gave just such an instruction.[33] Because it was long of no consequence whether evidence was direct or non-direct, until recently no body of law was fashioned regarding what would constitute such not-essential direct evidence.

Justice O'Connor's concurring opinion in *Price Waterhouse* set a number of lower courts on the vexing task of devising some definition of "direct evidence." In *Price Waterhouse* Justice Kennedy correctly anticipated that the application of a "direct evidence" requirement would lead to substantial difficulties.

> Courts will...be required to make the often subtle and difficult distinction between "direct" and "indirect" or "circumstantial" evidence.... [A]...burden-shifting mechanism, the application of which itself depends on...whether evidence is sufficiently direct...is not likely to lend clarity to the process.

490 U.S. at 291.

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[33] At the outset of the trial the judge had instructed the jury, without objection from either party,

> some of you may have heard the terms "direct evidence" and "circumstantial evidence." You are instructed that you are not to be concerned with those terms since the law makes no distinction between the weight to be given direct and circumstantial evidence.

(Tr. 25).

The problem which Justice Kennedy foresaw quickly came to pass. The Second Circuit observed only a few years after the decision in *Price Waterhouse* that "the various circuits have about as many definitions for 'direct evidence' as they do employment discrimination cases." *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir. 1992). In 1999 the First Circuit offered a detailed analysis of the various approaches, observing that "generally speaking, three schools of thought have emerged." *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 582 (1st Cir. 1999). In 2002 the Ninth Circuit described in stark terms the "chaos" and "morass" that resulted from the efforts of the lower courts to "convert[ ] Justice O'Connor's reference [to direct evidence] into a legal standard."

> The resulting jurisprudence has been a quagmire that defies characterization despite the valiant efforts of various courts and commentators. Within circuits, and often within opinions, different approaches are conflated, mixing burden of persuasion with evidentiary standards, confusing burden of ultimate persuasion with the burden to establish an affirmative defense, and declining to acknowledge the role of circumstantial evidence.

Costa v. Desert Palace, Inc., 299 F.3d 838, 851-53 (9th Cir. 2002). In its 2003 brief in *Desert Palace*, the United States noted that "the courts of appeals...have

struggled to define the contours of [the] direct evidence requirement."[34] The employer in *Desert Palace* observed that "[t]he circuit courts...have defined direct evidence in different ways, causing confusion in application."[35]

In the absence of any textual basis for a "direct evidence" requirement, the Eighth Circuit alone has fashioned and applied three distinct "direct evidence" standards. First, one line of decisions in the Eighth Circuit[36] defines "direct evidence" as the converse of circumstantial evidence.[37]

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[34] Brief for the United States as Amicus Curiae, No. 02-679, at 24.

[35] Brief for Petitioner, No. 02-679, at 9.

[36] This does not appear to be the prevailing definition of direct evidence in the Eighth Circuit in the last few years. See *Libel v. Adventurelands of America, Inc.*, 482 F.3d 1028, 1034 (8th Cir. 2007).

[37] *Mayer v. Nextel West Corp.*, 318 F.3d 803, 806 (8th Cir. 2003) ("[b]ecause Mayer presented no direct evidence of intentional age discrimination, but rather based his claim solely on circumstantial evidence, we apply the well-known *McDonnell Douglas* analytical framework"); *Day v. Johnson*, 119 F.3d 650, 654 (8th Cir. 1997) ("[b]ecause [plaintiffs] produced no direct evidence of discriminatory intent, we must decide whether they introduced sufficient circumstantial evidence"); *Kneibert v. Thomson Newspapers, Michigan Inc.*, 129 F.3d 444, 451 (8th Cir. 1997) ("Two methods exist by which a plaintiff can attempt to prove intentional discrimination. First, the plaintiff may present direct evidence of employment discrimination.... Second, the plaintiff can...satisfy his burden of proof using circumstantial evidence."); *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1331-32 (8th Cir. 1996) ("There are two methods by which a

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> The term "direct evidence"...is simply evidence, which if believed, proves the existence of a fact in issue without inference or presumption.... The term "circumstantial evidence," on the other hand, is..."[e]vidence based on inference...." *Black's Law Dictionary* 595 (8th ed. 2004).

Bakhtiari v. Lutz, 507 F.3d 1132, 1137 n.3 (8th Cir. 2007). That is the definition of direct evidence which respondent advanced in the courts below.[38] Several other courts of appeals also define "direct evidence" as "evidence that proves the existence of a fact without requiring any inferences." *Grizell v. City of Columbus Division of Police*, 461 F.3d 711, 719 (6th Cir. 2006).[39]

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plaintiff can attempt to prove intentional discrimination. First, a plaintiff may satisfy his burden by presenting direct evidence of discrimination.... [T]he Supreme Court has developed a second, indirect method of proof by which a plaintiff can satisfy his burden using circumstantial evidence.").

[38] Appellant's Brief, Nos. 07-1490 and 01-1492 (8th Cir.), 30 ("The framework for evaluating an age discrimination claim is dependent [on] whether the type of evidence presented in support of the claim is direct or circumstantial."), 32 ("Where there is only circumstantial evidence of age discrimination, a mixed motive instruction incorrectly states the law.").

[39] Essentially the same definition of "direct evidence" is set out in *Amrhein v. Health Care Service Corp.*, 546 F.3d 854, 858 (7th Cir. 2008), *Sanders v. Southwestern Bell Telephone, L.P.*, 544 F.3d 1101, 1105 (10th Cir. 2008), and *Rojas v. Florida*, 285 F.3d 1339, 1342 n.5 (11th Cir. 2002).

This definition would require proof of a facially discriminatory directive, such as "fire everyone over 40." Testimony about an express statement of an intent to discriminate, even if uttered at the moment of the decision or action in question, would not be direct evidence in this sense, because the trier of fact would have to infer that the speaker was truthfully describing his or her motives.[40] Cases involving either type of exceptional evidence are particularly rare, because employers generally know better than to "announce that they are acting on prohibited grounds." *Erwin v. Potter*, 79 Fed.Appx. 893, 896 (6th Cir. 2003).

Second, a number of Eighth Circuit decisions hold that "'direct' refers to the causal strength of the proof" and is satisfied only by "*strong*...evidence that illegal discrimination motivated the employer's adverse action." *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004) (emphasis added); see

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[40] See *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176 (2d Cir. 1992):

> Even a highly probative statement like "You're fired, old man" still requires the factfinder to draw the inference that the plaintiff's age had a causal relationship to the decision.

958 F.2d at 1185.

The official who made the statement might have been trying to cover up some even more improper purpose, such as the refusal of the employee to pay a bribe to get the job, or might have made the remark in a spiteful attempt to cause the employer legal difficulties.

King v. Hardesty, 517 F.3d 1049, 1057 (8th Cir. 2008) (equating "direct evidence" with "evidence that *clearly* points to the presence of an illegal motive") (emphasis added).[41] This definition of "direct evidence" is similar to, although perhaps more stringent than, a requirement of proof by clear and convincing evidence.[42]

A third line of Eighth Circuit cases requires a very specific and uncommon type of circumstantial evidence.

> "Direct evidence"...is evidence "showing a specific link between the alleged discriminatory animus and the challenged decision...."

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[41] See *Shaffer v. Potter*, 499 F.3d 900, 904 (8th Cir. 2007) ("clearly points"); *Gammon v. Flowers*, 211 Fed.Appx. 523, 524 (8th Cir. 2006) ("strong"); *Lewis v. St. Cloud University*, 467 F.3d 1133, 1135 (8th Cir. 2006) ("strong"); *EEOC v. Trans States Airlines, Inc.*, 462 F.3d 987, 992 (8th Cir. 2006) ("strong evidence"); *Arraleh v. County of Ramsey*, 461 F.3d 967, 974 (8th Cir. 2006) ("clearly points"); *Torlowei v. Target*, 401 F.3d 933, 934 (8th Cir. 2005) ("strong").

[42] The Second Circuit has similarly held that "to warrant a mixed-motive burden shift, the plaintiff must be able to produce a 'smoking gun' or at least a 'thick cloud of smoke' to support his allegations of discriminatory treatment." *Sista v. CDC Ixis North America, Inc.*, 445 F.3d 161, 174 (2d Cir. 2006) (quoting *Raskin v. Wyatt Co.*, 125 F.3d 55, 61 (2d Cir. 1997)). The most recent Second Circuit decisions hold that only a "smoking gun" will suffice. *Holcomb v. Iona College*, 521 F.3d 130, 141 (2d Cir. 2008) ("Direct evidence of discrimination, 'a smoking gun,' is typically unavailable"); *Beauchat v. Mineta*, 257 Fed.Appx. 463, 463 (2d Cir. 2007) (plaintiff's evidence was "not the type of direct evidence or 'smoking gun' needed to establish gender or race discrimination via *Price-Waterhouse* mixed-motive analysis").

> ...It does not extend to..."statements by non-decisionmakers," or "statements by decision-makers unrelated to the decisional process itself."

(Pet. App. 5a) (quoting *Thomas v. First Nat'l Bank of Wynne*, 111 F.3d 64, 66 (8th Cir. 1997)), and *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring)). In practice this line of Eighth Circuit decisions categorizes only two uncommon types of circumstantial evidence as "direct evidence." First, a statement by an individual involved in the decisionmaking process is direct evidence if that statement both indicates a bias against the group of which the plaintiff is a member and was uttered at about the point in time when the decision in question was made.[43] The temporal limitation is a narrow one; biased remarks made four or five months[44] prior to the decision are deemed too remote in time to constitute direct evidence. Second, a statement by an individual involved in the decisionmaking process is direct evidence, regardless of when made, if that statement

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[43] E.g., *Roberts v. Park Nicollet Health Services*, 528 F.3d 1123, 1128 (8th Cir. 2008) (statements made on the day the plaintiff was fired and two days earlier).

[44] *Ramlet v. E.F. Johnson Co.*, 507 F.3d 1149, 1153 (8th Cir. 2007) ("[t]he comments were not related to the decisional process as the most recent occurred at least four months before [the plaintiff's] termination and both were made to employees not involved in the decisional process."); *Quick v. Wal-Mart Stores, Inc.*, 441 F.3d 606, 609 (8th Cir. 2006) (five months too remote in time).

specifically questions the work competence or fitness of the group of which the plaintiff is a member.[45] Statements in either category are only direct evidence if their discriminatory meaning is unequivocal.[46]

On the other hand, statements by a decision-maker of even virulent (but not job-specific) animus on the basis of race, gender, age, or other protected

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[45] E.g., *King v. Hardesty*, 517 F.3d 1049, 1058-59 (8th Cir. 2008) ("white people teach black kids...better than someone from their own race"); *Mohr v. Dustrol, Inc.*, 306 F.3d 636, 642 (8th Cir. 2002) ("derogatory comments about the workplace capabilities of women and non-Hispanics").

[46] In *Ramlet v. E.F. Johnson Co.*, 507 F.3d 1149, one of the decisionmakers had earlier remarked that he wanted to hire "a bunch of young...and full of cum guys," and that he "intended to hire 'young studs' to replace the older sales people." 507 F.3d at 1152. This was held not to constitute direct evidence supporting the plaintiff's ADEA claim because "an inference is required to connect the statements to [the plaintiff], as they do not mention him or indicate that [the official quoted] considered him 'older.'" 507 F.3d at 1153.

In *Twymon v. Wells Fargo & Co.*, 462 F.3d 925, 934, the Eighth Circuit held that a statement by a white official to a black worker that "you don't know your place," although made by a supervisor who had made other racial remarks, was not direct evidence because the statement was "facially race-neutral," and would require an "extrapolat[ion of] racial animus."

In *E.W. Blanch Co., Inc. v. Enan*, 124 F.3d 965 (8th Cir. 1997), the plaintiff alleged that he had been denied a position on the board of directors because of his age. Mr. Blanch (apparently the principal of the firm) commented that one of the individuals who was selected "is the right age." 124 F.3d at 970. The court found this insufficient because the comment "made no direct reference to Mr. Enan's age." *Id*.

characteristic do not constitute direct evidence (in this third sense) if they are not made in connection with the decisional process itself.[47] Statements by

[47] In *Twymon v. Wells Fargo Co.*, 462 F.3d 925 (8th Cir. 2006), one of the white officials involved in the dismissal of the black plaintiff had earlier made a series of remarks which the court of appeals acknowledged were "racially offensive." 462 F.3d at 934.

> Twymon alleges that...Hall explained to her that "intelligence and outspokenness in black employees is not welcomed" and that "qualities that would make a Caucasian a golden child, being aggressive and intelligent and outspoken and a go-getter, would do exactly the reverse to a person of color." Twymon alleges that Hall advised her to develop a deferential persona, as "a good black" that "would be accepted by the Caucasians at Wells Fargo,".... Twymon alleges she responded by asking if she should "act[ ] like an Uncle Tom" and states that Hall replied in the affirmative.

462 F.3d at 931. Another decisionmaker commented that "she didn't see any problem" when Twymon objected that co-workers had criticized her for dating white men. *Id*. The court of appeals held that this was not "direct evidence" because "none of the statements...were related to the decisional process." 462 F.3d at 934.

In *Canady v. Wal-Mart Stores, Inc.*, 440 F.3d 1031 (8th Cir. 2006), the black plaintiff's white supervisor referred to the plaintiff as a "lawn jockey," remarked that all African-Americans look alike, stated that the plaintiff's "skin color seemed to wipe off onto towels," and asked "What's up, my nigga?" 440 F.3d at 1033. The court of appeals held that this was not direct evidence, explaining that the "comments are best classified as, 'statements by a decisionmaker unrelated to the decisional process.'" 440 F.3d at 1034 (quoting *Simmons v. Oce-USA, Inc.*, 174 F.3d 913, 916 (8th Cir. 1999)).

In *Simmons v. Oce-USA, Inc.*, 174 F.3d 913 (8th Cir. 1999), the supervisor whose evaluations had led to the dismissal of the

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individuals not involved in the decisionmaking process are never direct evidence, even though they may reveal a corporate culture in which biased remarks or actions are openly tolerated.[48] Circumstantial

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black plaintiff had referred to him as "Buckwheat" and told a joke about the sexual organs of African-Americans. 174 F.3d at 915. The court of appeals recognized that the first remark was "a racial slur when it is directed towards a black employee," but held that these statements were not direct evidence but merely "statement[s] by [a] decisionmaker[ ] unrelated to the decisional process." 174 F.3d at 916 (quoting *Rivers-Frison v. Southeast Mo. Community Treatment Ctr.*, 133 F.3d 616, 619 (8th Cir. 1998)).

In *Yates v. Douglas*, 255 F.3d 546 (8th Cir. 2001), a supervisor "had used the word 'nigger' to describe black people, and...used similarly offensive language in direct reference to [the plaintiff]." 255 F.3d at 548. The court of appeals held that these statements were not direct evidence, but were "best classified as statements by a decisionmaker unrelated to the decisional process." 255 F.3d at 549.

In *Rivers-Frison v. Southeast Mo. Community Treatment Ctr.*, 133 F.3d 616 (8th Cir. 1998), the decisionmaker had commented that "too many African-Americans were moving into [the city where the office was located]." 133 F.3d at 618. The court of appeals held that this was not direct evidence because it "had no relation to [the plaintiff's] employment status or to the conduct of the Center's business." 133 F.3d at 619.

In *Philipp v. ANR Freight System, Inc.*, 61 F.3d 669 (8th Cir. 1995), one decisionmaker had "referred to [the plaintiff] on occasion as 'the old man.'" 61 F.3d at 674. The court of appeals held that that was not direct evidence because there was no "evidence showing a 'specific link between discriminatory animus and the challenged decision.'" *Id.* (quoting *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 996 F.2d 200, 201 n.1 (8th Cir. 1993)).

[48] E.g., *Carraher v. Target Corp.*, 503 F.3d 714, 718 (8th Cir. 2007) (statement by human resources manager that "[o]lder,

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evidence other than express statements by persons involved in the decisionmaking process, such as proof that "discriminatory attitudes were prevalent," does not constitute direct evidence. *Philipp v. ANR Freight System, Inc.*, 61 F.3d 669, 674 (8th Cir. 1995).

In the instant case, of course, it would be possible for the Court to resolve this problem by picking any one of these definitions, or perhaps fashioning (as so many lower courts have) some entirely new definition of "direct evidence." But it manifestly would be impracticable to mandate use of that particular standard for *all* cases and issues in which conventional evidentiary requirements are not to be utilized. Rather, the Court would have to frame some general guideline, applicable to a wide range of issues that arise in civil cases, that the lower courts could in the future apply in deciding how to fashion a non-traditional evidentiary standard whenever they decide to depart from the conventional standards.

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more experienced candidates do not have fire in the belly."); *Libel v. Adventurelands of America, Inc.*, 482 F.3d 1028 (8th Cir. 2007) (statement made by the CEO of the employer who was also the father of the official who dismissed the plaintiff); *Rivers-Frison v. Southeast Mo. Community Treatment Ctr.*, 133 F.3d 616, 618-19 (8th Cir. 1998) (racial remarks made by the human resources coordinator in the presence of the decisionmaker).

III. SPECIAL EVIDENTIARY STANDARDS WOULD IMPEDE ENFORCEMENT OF THE ADEA

This case concerns the principle, first articulated in *Mt. Healthy City School District Bd. of Education v. Doyle*, 429 U.S. 274 (1977), that where a plaintiff establishes that an impermissible purpose was a motivating factor in an adverse decision, the defendant must "show[ ] by a preponderance of the evidence that it would have reached the same decision even in the absence [of the impermissible purpose]." 429 U.S. at 287. Neither the Eighth Circuit nor any other court of appeals has suggested that the *Mt. Healthy* principle should never be applied to ADEA cases.

The Eighth Circuit, however, has created an exception to the *Mt. Healthy* principle – excluding cases in which a plaintiff lacks direct evidence – that would simply swallow the rule itself. All thirteen courts of appeals have agreed that direct evidence is only rarely available.[49] The Eighth Circuit has

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[49] *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999) ("[b]ecause discrimination tends more and more to operate in subtle ways, direct evidence is relatively rare"); *Holcomb v. Iona College*, 521 F.3d 130, 141 (2d Cir. 2008) ("[d]irect evidence of discrimination, 'a smoking gun,' is typically unavailable"); *Dillon v. Coles*, 746 F.2d 998, 1002-03 (3d Cir. 1984) ("in most employment discrimination cases direct evidence of the employer's motivation is unavailable or difficult to acquire"); *Spain v. Mecklenburg County School Bd.*, 54 Fed.Appx. 129, 132-33 (4th Cir. 2002) ("it is often difficult for a

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repeatedly acknowledged that the requisite "direct evidence of discriminatory intent is rare." *Marzec v.*

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plaintiff to provide direct evidence of discriminatory intent"); *Portis v. First Nat'l Bank*, 34 F.3d 325, 328 (5th Cir. 1994) ("direct evidence is rare"); *Scott v. University of Miss.*, 148 F.3d 493, 504 (5th Cir. 1998) ("direct evidence is rare in discrimination cases"); *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1135 (5th Cir. 1983) ("the plaintiff frequently finds it an impossible or most difficult task to produce direct evidence of an employer's intent to discriminate"); *Erwin v. Potter*, 79 Fed.Appx. 893, 896 (6th Cir. 2003) ("[d]irect evidence of discrimination is rare because employers generally do not announce that they are acting on prohibited grounds"); *Amrhein v. Health Care Service Corp.*, 546 F.3d 854, 858 (7th Cir. 2008) ("direct evidence of discriminatory intent is rare"); *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 662 (9th Cir. 2002) ("[p]articularly because employers now know better, direct evidence of employment discrimination is rare"); *Hardeman v. City of Albuquerque*, 377 F.3d 1106, 1117 (10th Cir. 2004) ("direct evidence of discriminatory intent or purpose usually is unavailable"); *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1191 (11th Cir. 1997) ("[it] is...the rare case where there is direct evidence of retaliatory motive"); *Mayfield v. Patterson Pump Co.*, 101 F.3d 1371, 1375 (11th Cir. 1996) ("direct evidence of discrimination can be difficult to produce"); *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1528 (11th Cir. 1987) ("[i]t is rare that direct evidence of discrimination exists"); *Aka v. Washington Hosp. Center*, 156 F.3d 1284, 1293 (D.C. Cir. 1998) ("direct evidence of intentional discrimination is hard to come by") (quoting *Price Waterhouse*, 490 U.S. at 271 (O'Connor, J., concurring)); *Crawford-El v. Britton*, 93 F.3d 813, 833 (D.C. Cir. 1996) ("direct evidence of an unconstitutional motive for an ostensible legal act is virtually never available") (en banc) (Silberman, J., concurring); *Haddon v. Executive Residence at the White House*, 313 F.3d 1352, 1358 (Fed. Cir. 2002) ("direct evidence is rarely available in retaliation cases").

Marsh, 990 F.2d 393, 395 (8th Cir. 1993);[50] see *Price Waterhouse*, 490 U.S. at 271 ("direct evidence of intentional discrimination is hard to come by") (O'Connor, J., concurring).

> As the intent is the design, purpose, resolve, or determination in the mind of the [defendant], it can rarely be proved by direct evidence, but must be ascertained by means of inferences from the facts and circumstances developed by proof.

Bailey v. Alabama, 219 U.S. 219, 233 (1911).

The definition of direct evidence applied by the court below excludes virtually all of the types of circumstantial evidence which this Court has recognized can be probative of a discriminatory intent. *Sprint v. Mendelsohn*, 128 S.Ct. 1140, 1143 (2008) (discriminatory acts and statements by supervisors not involved in decisionmaking process); *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (biased remarks made outside the context of disputed decision; denial

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[50] *Wallace v. DTG Operations, Inc.*, 442 F.3d 1112, 1117 (8th Cir. 2006) ("direct evidence of intent is often difficult or impossible to obtain"); *EEOC v. Liberal R-II School Dist.*, 314 F.3d 920, 923 (8th Cir. 2002) ("direct evidence of discrimination is rare"); *Reich v. Hoy Shoe Co., Inc.*, 32 F.3d 361, 364 (8th Cir. 1994) ("it may be difficult to prove an employment discrimination case by direct evidence"); *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1108 (8th Cir. 1994) ("[i]t is axiomatic that employment discrimination need not be proved by direct evidence, and indeed, that doing so is often impossible....").

of promotion to better qualified minority applicant); *Reeves*, 530 U.S. at 147-48 (falsity of employer's explanation), 151 (more favorable treatment of similarly situated younger worker), 152 (changing explanation by defendant); *Anderson v. City of Bessemer City*, 470 U.S. 564, 576-77 (1985) (differing treatment of male and female applicants during interview process); *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.2 (1983) (denial of promotion to better qualified minority applicant; "derogatory remarks about blacks in general and the plaintiff in particular"); *Rogers v. Lodge*, 458 U.S. 613, 622-28 (1982) (disparate impact of decision on racial minorities); *Teamsters v. United States*, 431 U.S. 324, 337-38, 339, 342 n.23 (statistics), 339 (inaccurate statements to minority applicants) (1977); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 262-68 (1977) (history of discrimination, timing of disputed action, departure from usual procedures or substantive standards); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973) (statistics, general policy and practice with respect to minority employment, dissimilar treatment of other worker who engaged in misconduct "of comparable seriousness"). If the *Mt. Healthy* principle were applicable only in the handful of exceptional cases in which a plaintiff could prove discrimination without resort to any of these types of evidence, the principle itself would be largely meaningless.

The *Mt. Healthy* principle is essential to the enforceability of statutory and constitutional commands – in this case the ADEA prohibition against age-based discrimination – forbidding action based on an impermissible motive. The allocation of the burden of proof is outcome determinative in those cases in which a material issue is sufficiently uncertain that the trier of fact cannot determine the answer one way or the other. That problem of uncertainty is particularly likely to arise with regard to the problem addressed in *Mt. Healthy* and its progeny. Because it will often be difficult to determine what an employer would have done had it not considered an unlawful criterion, placing that burden on a plaintiff would seriously impede enforcement of a prohibition against discrimination.

What an employer would have done in that situation is not a fact, but merely "a hypothetical construct." *Price Waterhouse*, 490 U.S. at 240 (plurality opinion). Because it is highly unlikely that a defendant will admit that age was a motivating factor, there will rarely if ever be a witness who will testify in so many words about – or be subject to cross-examination regarding – what the employer would have done in the absence of discrimination. Often employers have no clearly established and rigid rules governing employment decisions, or even consistently applied practices, to which a plaintiff could point to meet this burden. If the plaintiff bore the burden of proof, a defendant often could add substantially to that burden by offering a welter of justifications for its actions, in the hope that the jury

would find at least one of the proffered explanations credible. Skilled defense counsel could combine uncertainty about an employer's standards with confusion about a multiplicity of justifications in a manner that would confound a jury's efforts to assess what a defendant would have done in the absence of discrimination.

The instant case well illustrates both the difficulty of determining what an employer would have done in the absence of discrimination and the importance of which party bears the burden of proof on that issue. FBL did not have any written guidelines governing the reallocation of personnel during the reorganization that led to Gross's demotion. Nor did FBL suggest it had any rule or practice governing the weight of the various criteria that it invoked to explain that demotion. FBL offered at least five different justifications for the decision to demote Gross. Gross in turn offered substantial evidence that each of those justifications was unworthy of credence. If as to even *one* of those proffered justifications the jury concluded that it was a phony explanation, the jury could have inferred (although it would not have been required to do so) that age was a motivating factor.[51]

[51] A jury could conclude from the falsity of one proffered explanation that age was a motivating factor, even though the jury did not conclude that all of the explanations were false. That is precisely the sort of situation in which it matters which party bears the burden of proof regarding what an employer would have done in the absence of discrimination.

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> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." *Wright v. West*, 505 U.S. 277, 296 (1992).

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000).

To go further and determine what the employer would have done in the absence of discrimination, the jury would have to decide how important the factor age was (perhaps based on the credibility of the defense witnesses, the flagrancy of the falsity of the discredited explanation, or the other evidence suggesting age bias) and how plausible and weighty the remaining explanations appeared to be. A reasonable jury might well have concluded that it was impossible

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> At the summary judgment stage, the issue is whether the plaintiff has sufficient evidence that unlawful discrimination was *a* motivating factor in the defendant's employment action. If so, the presence of additional legitimate motives will not entitle the defendant to summary judgment. Therefore, evidence of additional motives, and the question whether the presence of mixed motives defeats all or some part of plaintiff's claim, are trial issue, not summary judgment issues.

Griffith v. City of Des Moines, 387 F.3d 733, 735 (8th Cir. 2004) (emphasis in original).

to say with any confidence what FBL would have done had age not been a motivating factor. Given the inherently speculative nature of this decision, it is entirely understandable that FBL's trial counsel – despite the instruction imposing this burden of proof on the defendant – made a tactical decision not to attempt to persuade the jury that FBL would have made the same decision in the absence of discrimination, and never challenged the sufficiency of the evidence to support the jury's rejection of that possible affirmative defense.

If, as will often be the case, it is not possible for the trier of fact to determine what would have occurred in the absence of discrimination, liability should be imposed on the employer.

> [T]he employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created...by his own wrongdoing.

Transportation Management, 462 U.S. at 403.

> While requiring that a plaintiff in a tort suit or a Title VII action prove that the defendant's "breach of duty" was the "but-for" cause of an injury does not generally hamper effective enforcement of the policies behind those causes of action, "at other times the [but-for] test demands the impossible. It challenges the imagination of the trier to

> probe into a purely fanciful and unknowable state of affairs. He is invited to make an estimate concerning facts that concededly never existed. The very uncertainty as to what *might* have happened opens the door wide for conjecture...."

Price Waterhouse, 490 U.S. at 264 (O'Connor, J., concurring) (emphasis in original) (quoting Malone, Ruminations on Cause-In-Fact, 9 Stan.L.Rev. 60, 67 (1956)).

> [P]lacing the risk of nonpersuasion on the defendant in a situation where uncertainty as to causation has been created by its consideration of an illegitimate criterion makes sense as a rule of evidence and furthers the substantive command of Title VII.

490 U.S. at 273 (O'Connor, J., concurring); see *id*. at 261-62 (O'Connor, J., concurring) ("employer has created uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion.").

If the plaintiff bore the too often impossible burden of establishing what would have occurred in the absence of discrimination, the employer would avoid liability in a substantial number of cases in which the adverse action would not indeed have otherwise occurred. That would usually be the inevitable consequence of limiting application of the *Mt. Healthy* principle to those rare cases in which the plaintiff has direct evidence.

IV. A DIRECT EVIDENCE REQUIREMENT IS NOT SUPPORTED BY THIS COURT'S DECISION IN *PRICE WATERHOUSE*

The Eighth Circuit erred in assuming that "Justice O'Connor's opinion concurring in the judgment [in *Price Waterhouse*] is the controlling opinion that sets forth the governing rule of law." (Pet. App. 5a).[52]

In *Price Waterhouse* a majority of the Court applied the *Mt. Healthy* principle to claims under Title VII, and rejected a direct evidence requirement. Six members of the Court agreed that once the plaintiff has established that an impermissible consideration was a motivating factor, the defendant bears the burden of showing that it would have made the same decision in the absence of discrimination.[53] The plurality opinion, joined by four members of the Court, contained no direct evidence requirement; to the contrary, it emphasized

> we do not suggest a limitation on the possible ways of proving that stereotyping played

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[52] Pet. App. 11a ("[*Price Waterhouse*] was a fragmented decision from which our court adopted Justice O'Connor's concurring opinion as the controlling rule."); *Bakhtiari v. Lutz*, 507 F.3d 1132, 1135 n.3 (8th Cir. 2007) ("Justice O'Connor, in her controlling concurrence, stated...."); *Erickson v. Farmland Industries, Inc.*, 271 F.3d 719, 724 (8th Cir. 2001) ("According to Justice O'Connor's controlling opinion in *Price Waterhouse*....").

[53] 490 U.S. at 237-52 (plurality opinion), 258-59 (White, J., concurring), 261 (O'Connor, J., concurring).

> a motivating role in an employment decision....

490 U.S. at 251-52.[54] Justice White in a separate concurring opinion, also did not include any such direct evidence requirement; the standard endorsed by Justice White was that it was the plaintiff's "burden to show that the unlawful motive was a *substantial* factor in the adverse employment action." 490 U.S. at 259 (emphasis in original). Thus a total of five justices (the plurality together with Justice White) agreed on a standard that conspicuously did not include any requirement that direct evidence is needed to show that an impermissible consideration was a motivating factor.

In *Price Waterhouse* Justice O'Connor alone proposed that which party would bear the burden of proof would depend on whether the plaintiff had

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[54] 490 U.S. at 257:

> Price Waterhouse concedes that the proof in *[NLRB v.] Transportation Management*, [462 U.S. 393 (1983)] adequately showed that the employer there had relied on an impermissible motivation in firing the plaintiff....But the only evidence in that case that a discriminatory motive contributed to the plaintiff's discharge was that the employer harbored a grudge toward the plaintiff on account of his union activities; there was, contrary to Price Waterhouse's suggestion, *no direct evidence* that that grudge had played a role in the decision.... If the partnership considers that proof sufficient, we do not know why it takes such vehement issue with Hopkins' proof.

(Plurality opinion) (emphasis added).

direct evidence. 490 U.S. at 276. But Justice O'Connor's sixth vote was not necessary to produce a majority, and thus does not play a role in ascertaining the holding of the Court.[55] The outcome in *Price Waterhouse* would have been the same even if Justice O'Connor had dissented.

Construed in the manner proposed by the Eighth Circuit, *Price Waterhouse* would have represented a surprising departure from the precedent from which it derived. In five decisions prior to *Price Waterhouse* this Court had held that where a plaintiff establishes that an impermissible purpose was a motivating factor behind an adverse action, the defendant bears the burden of showing that it would have made the same decision in the absence of that improper purpose. None of those prior decisions contained any direct evidence requirement. *Mt. Healthy City School District Bd. of Education v. Doyle*, 429 U.S. 274, 287 (1977) (First Amendment); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 n.21 (1977) (Equal Protection); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401-03 (1983) (NLRA); *Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (Equal Protection); *Board of*

[55] *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992) ("[W]hat we must do is find common ground shared by five or more justices.... The requirement of 'direct evidence' was not...adopted either by the plurality of four or by Justice White, so there was not majority support for this proposition.").

County Comm'rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668, 674 (1996) (First Amendment).

V. THE DECISION OF THE COURT OF APPEALS IS BASED ON A MISUNDERSTANDING OF THE RELATIONSHIP BETWEEN *PRICE WATERHOUSE* AND *McDONNELL DOUGLAS*

The Eighth Circuit's direct evidence requirement is rooted in a fundamental misunderstanding of the relationship of the decisions in *Price Waterhouse*, and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

The court below believed that *McDonnell Douglas* and *Price Waterhouse* represent two distinct methods for proving the existence of a discriminatory motive. Where a plaintiff lacks "direct evidence," the Eighth Circuit reasoned, *McDonnell Douglas* presents the "framework" for demonstrating the existence of an unlawful motive; if discrimination is proven under the *McDonnell Douglas* framework, that court asserted, the plaintiff bears the burden of proof as to whether the defendant would have made the same decision in the absence of discrimination. (Pet. App. 6a, 7a). On the other hand, the court below held, where a plaintiff does have direct evidence, the *Price Waterhouse* "framework" applies; if discrimination is proven under the *Price Waterhouse* framework, the defendant bears the burden of proof as to whether it would have made the same decision in the absence of

discrimination. (Pet. App. 6a, 8a). (Where the trier of fact concludes that a combination of both direct and circumstantial evidence is required to establish the existence of a discriminatory motive, it is unclear which "framework" the court of appeals would apply.)

McDonnell Douglas and *Price Waterhouse*, however, actually deal with distinct issues. *McDonnell Douglas* establishes a procedure which may be useful in evaluating evidence of the existence of a discriminatory motive. *McDonnell Douglas* does not address in any way the quite separate issue of causation, particularly the question of which party bears the burden of proof regarding what the defendant would have done in the absence of discrimination. *McDonnell Douglas*' silence regarding that issue is hardly surprising, because it was decided four years before this Court first considered the causation issue in *Mt. Healthy*.

In *Price Waterhouse*, on the other hand, the central issue, unlike *McDonnell Douglas*, was the question of causation.[56] A majority of the Court agreed that, once a plaintiff establishes that an impermissible consideration was a motivating factor, the plaintiff is entitled to prevail unless the employer proves by a preponderance of the evidence that it would have

[56] 490 U.S. at 238-55 (plurality opinion), 258-61 (White, J., concurring), 261-79 (O'Connor, J., concurring), 279-95 (Kennedy, J., dissenting), 281 (Kennedy, J. dissenting) ("[t]he plurality's causation analysis is misdirected.").

made the same decision in the absence of discrimination. See 490 U.S. at 260 (White, J., concurring) (agreeing with the plurality's "approach to causation.")

The Eighth Circuit erred in assuming that direct and circumstantial evidence of a discriminatory motive are to be evaluated separately under distinct "frameworks," as if discrimination-proven-by-direct-evidence and discrimination-proven-by-circumstantial evidence were separate claims. In deciding whether an impermissible purpose was a motivating factor, the trier of fact considers *all* the evidence together, regardless of whether some of that evidence might be characterized as direct evidence. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977).[57] "As in any lawsuit, a plaintiff may

[57] See *Vieth v. Jubelirer*, 541 U.S. 267, 280 (2004) (racial motive); *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (racial motive) (quoting *Arlington Heights*); *Abrams v. Johnson*, 521 U.S. 74, 81 (1997) (racial motive); *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 488 (1997) (racial motive) (quoting *Arlington Heights*); *Bush v. Vera*, 517 U.S. 952, 1000 (1996) (racial motive); *Shaw v. Hunt*, 517 U.S. 899, 905 (1996) (racial motive); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (racial motive); *Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (religious motive); *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (political motive); *Rose v. Clark*, 478 U.S. 570, 572 (1986) (malice); *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) (quoting *Arlington Heights*); *Rowland v. Mad River Local School*

(Continued on following page)

prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves." *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983). In the evaluation of that evidence, whether each particular item of evidence might under some classification system be deemed direct or indirect evidence is wholly irrelevant. No decision of this Court has suggested that direct and circumstantial evidence are to be separately assessed in different "frameworks," or that the trier of fact in evaluating evidence ought first decide whether it was direct or non-direct in nature.

McDonnell Douglas does not establish a rigid comprehensive framework within which certain (or all) evidence of discrimination must be evaluated. *McDonnell Douglas* merely imposes a burden of production, requiring a defendant to articulate a legitimate non-discriminatory reason if the plaintiff has established a prima facie case of discrimination. But presence vel non of that burden of production, and the standards regarding when it is created, are irrelevant whenever a defendant *has* offered evidence of such a non-discriminatory reason. "If...the defendant has succeeded in carrying its burden of production, the *McDonnell Douglas* framework – with its presumptions and burdens – is no longer relevant."

Dist., 470 U.S. 1009, 1017 n.13 (1985) (motive based on sexual preference); *Rogers v. Lodge*, 458 U.S. 613, 618 (1982) (racial motive) (quoting *Arlington Heights*).

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 510 (1993).

> Where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case [under *McDonnell Douglas*], whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether "the defendant intentionally discriminated against the plaintiff."

United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).[58] In the instant case, the defendant had met its burden of production, offering at trial evidence of several non-discriminatory purposes which it asserted were the reasons for Gross's demotion. Neither *McDonnell Douglas* nor *Price Waterhouse* provide any particular "framework" for determining, once such non-discriminatory justifications have been offered, whether an unlawful purpose was in fact a motivating factor

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[58] *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008):

> In a Title VII disparate-treatment suit where an employee has suffered an adverse action and an employer has asserted a legitimate, non-discriminatory reason for the decision, the district court need not – *and should not* – decide whether the plaintiff actually made out a prima facie case under *McDonnell Douglas*.

(Emphasis in original).

underlying the employment decision at issue. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143-53 (2000).

CONCLUSION

For the above reasons, the decision of the Court of Appeals should be vacated, and the case remanded for further consideration consistent with the opinion of the Court.

Respectfully submitted,

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Federal Statutes
Establishing Elevated Evidentiary Requirements

3 U.S.C. § 20 (written evidence)

5 U.S.C. § 1214(b)(4)(B)(ii) ("clear and convincing evidence")

5 U.S.C. § 1221(e)(2) ("clear and convincing evidence")

6 U.S.C. § 1142(c)(2)(B) ("clear and convincing evidence")

7 U.S.C. § 1736f-1(c)(1)(A)(i)(I) ("clear evidence")

7 U.S.C. § 2009h (written evidence)

8 U.S.C. § 1154(a)(2)(A)(i) ("clear and convincing evidence")

8 U.S.C. § 1158(a)(2)(B) ("clear and convincing evidence")

8 U.S.C. § 1182(a)(3)(B)(i)(VI) ("clear and convincing evidence")

8 U.S.C. § 1229a(b)(5)(A) ("clear, unequivocal, and convincing evidence")

8 U.S.C. § 1229a(c)(1) ("clear and convincing evidence")

8 U.S.C. § 1229c(b)(1)(D) ("clear and convincing evidence")

8 U.S.C. § 1232(c)(3)(B) ("objective evidence")

8 U.S.C. § 1252(f)(2) ("clear and convincing evidence")

8 U.S.C. § 1255(e)(3) ("clear and convincing evidence")

8 U.S.C. § 1324a(a)(6)(C)(ii) ("clear and convincing evidence")

8 U.S.C. § 1409(a)(1) (“clear and convincing evidence”)

8 U.S.C. § 1448(a) (“clear and convincing evidence”)

8 U.S.C. § 1612(a)(2)(A)(H)(ii) (“clear and convincing evidence”)

10 U.S.C. § 850a(b) (“clear and convincing evidence”)

10 U.S.C. § 949k(b) (“clear and convincing evidence”)

10 U.S.C. § 1201(b)(3)(B)(i) (“clear and unmistakable evidence”)

11 U.S.C. § 362(c)(3) (“clear and convincing evidence”)

11 U.S.C. § 502(k)(2) (“clear and convincing evidence”)

12 U.S.C. § 2503 (written evidence)

15 U.S.C. § 2087(b)(2)(B) (“clear and convincing evidence”)

15 U.S.C. § 6604(a) (“clear and convincing evidence”)

15 U.S.C. § 6604(b)(3) (“clear and convincing evidence”)

16 U.S.C. § 284c(b)(3) (“clear evidence”)

18 U.S.C. § 17(b) (“clear and convincing evidence”)

18 U.S.C. § 924(d)(1) (“clear and convincing evidence”)

18 U.S.C. § 3142(f)(2)(B) (“clear and convincing evidence”)

18 U.S.C. § 3143 (“clear and convincing evidence”)

18 U.S.C. § 3148(b)(1)(B) (“clear and convincing evidence”)

18 U.S.C. § 3524(e)(1) (“clear and convincing evidence”)

18 U.S.C. § 3559(c)(3) (“clear and convincing evidence”)

18 U.S.C. § 3563(b)(21) (“clear and convincing evidence”)

18 U.S.C. § 3600(a)(10)(A)(ii) ("clear and convincing evidence")

18 U.S.C. § 3600(g)(2) ("compelling evidence")

18 U.S.C. § 3626(a)(3)(E) ("clear and convincing evidence")

18 U.S.C. § 3771(a)(3) ("clear and convincing evidence")

18 U.S.C. § 4243(d) ("clear and convincing evidence")

18 U.S.C. § 4246(d) ("clear and convincing evidence")

18 U.S.C. § 4248(d) ("clear and convincing evidence")

19 U.S.C. § 1592(e)(2) ("clear and convincing evidence")

19 U.S.C. § 1593a(i)(2) ("clear and convincing evidence")

19 U.S.C. § 2252(d)(2)(A) ("clear evidence")

20 U.S.C. § 1092(f)(4)(B)(iii) ("clear and convincing evidence")

20 U.S.C. § 1412(a)(17)(C) ("clear and convincing evidence")

20 U.S.C. § 6736(c)(1) ("clear and convincing evidence")

20 U.S.C. § 9578(a)(3) ("clear and convincing evidence")

22 U.S.C. § 1972(2) ("clear and convincing evidence")

22 U.S.C. § 6082(a)(2) ("clear and convincing evidence")

25 U.S.C. § 458aaa-6(a)(2)(D) ("clear and convincing evidence")

25 U.S.C. § 458aaa-17 ("clear and convincing evidence")

25 U.S.C. § 1912(e) ("clear and convincing evidence")

25 U.S.C. § 2206(a)(4) ("clear and convincing evidence")

25 U.S.C. § 2504(b)(2)(B) ("clear and convincing evidence")

26 U.S.C. § 47(d)(3)(D) ("clear and convincing evidence")

26 U.S.C. § 148(b)(4)(E) ("objective evidence")

26 U.S.C. § 280G(b) ("clear and convincing evidence")

26 U.S.C. § 357(b)(2) ("clear preponderance of the evidence")

26 U.S.C. § 613A(b)(3) ("clear and convincing evidence")

26 U.S.C. § 1260(e) ("clear and convincing evidence")

26 U.S.C. § 1551(a) ("clear preponderance of the evidence")

26 U.S.C. § 7409(b) ("clear and convincing evidence")

28 U.S.C. § 352(b)(1)(B) ("conclusively refuted by objective evidence")

28 U.S.C. § 592(a)(2)(B)(ii) ("clear and convincing evidence")

28 U.S.C. § 2244(b)(2)(B)(ii) ("clear and convincing evidence")

28 U.S.C. § 2254(e) ("clear and convincing evidence")

28 U.S.C. § 2255(h)(1) ("clear and convincing evidence")

28 U.S.C. § 2639(b) ("clear and convincing evidence")

29 U.S.C. § 106 ("clear proof")

29 U.S.C. § 464(c) ("clear and convincing evidence")

29 U.S.C. § 721(a)(10)(C)(i)(II) ("clear and convincing evidence")

29 U.S.C. § 721(a)(10)(C)(i)(II) ("clear and convincing evidence")

29 U.S.C. § 722(a)(2)(A) ("clear and convincing evidence")

29 U.S.C. § 1322(c)(4) ("clear and convincing evidence")

29 U.S.C. § 1344(f)(4) ("clear and convincing evidence")

29 U.S.C. § 1401(c) ("clear preponderance of the evidence")

31 U.S.C. § 1501(a) (documentary evidence)

31 U.S.C. § 6711(c) ("clear and convincing evidence")

35 U.S.C. § 273(b)(4) ("clear and convincing evidence")

36 U.S.C. § 220525(a)(2)(A) ("clear and convincing evidence")

36 U.S.C. § 220527(b) ("clear and convincing evidence")

38 U.S.C. § 1111 ("clear and unmistakable evidence")

38 U.S.C. § 1133(b) ("clear and unmistakable evidence")

38 U.S.C. § 1154(b) ("clear and convincing evidence")

38 U.S.C. § 24111(c) ("clear and convincing evidence")

42 U.S.C. § 247d-6d(c)(3) ("clear and convincing evidence")

42 U.S.C. § 247d-6e(b) ("compelling, reliable, valid, medical and scientific evidence")

42 U.S.C. § 300aa-22(b)(2)(B) ("clear and convincing evidence")

42 U.S.C. § 666(a)(5)(J) ("clear and convincing evidence")

42 U.S.C. § 1973b(a)(9) ("objective and compelling evidence")

42 U.S.C. § 3796b(5)(ii) ("convincing evidence")

42 U.S.C. § 4605(c) ("clear and convincing evidence")

42 U.S.C. § 5851(b)(3) ("clear and convincing evidence")

42 U.S.C. § 6313(a)(6)(A)(ii)(II) ("clear and convincing evidence")

42 U.S.C. § 6314(a) ("clear and convincing evidence")

42 U.S.C. § 6727(a)(2)(A) ("clear and convincing evidence")

42 U.S.C. § 11603(e)(2)(A) ("clear and convincing evidence")

42 U.S.C. § 14503(e)(1) ("clear and convincing evidence")

42 U.S.C. § 14924(e)(4) ("clear and convincing evidence")

42 U.S.C. § 17196(b)(2) ("clear and convincing evidence")

45 U.S.C. § 905(b) ("clear and convincing evidence")

47 U.S.C. § 325(e)(11)(A) ("clear and convincing evidence")

47 U.S.C. § 338(i)(9)(A) ("clear and convincing evidence")

47 U.S.C. § 339(a)(2)(D)(viii) ("clear and convincing evidence")

47 U.S.C. § 532(f) ("clear and convincing evidence")

47 U.S.C. § 511(h)(1) ("clear and convincing evidence")

49 U.S.C. § 28103(a)(1) ("clear and convincing evidence")

49 U.S.C. § 42121(b)(2)(B) ("clear and convincing evidence")

49 U.S.C. § 60129(b)(2)(B)(2) ("clear and convincing evidence")